



**Virginia
Regulatory
Town Hall**

Notice of Intended Regulatory Action Agency Background Document

Agency Name:	Board of Optometry, Department of Health Professions
VAC Chapter Number:	18 VAC 105-20-10 et seq.
Regulation Title:	Regulations Governing the Practice of Optometry
Action Title:	Practice in mercantile establishments
Date:	8/22/2000

This information is required prior to the submission to the Registrar of Regulations of a Notice of Intended Regulatory Action (NOIRA) pursuant to the Administrative Process Act § 9-6.14:7.1 (B). Please refer to Executive Order Twenty-Five (98) and Executive Order Fifty-Eight (99) for more information.

Purpose

Please describe the subject matter and intent of the planned regulation. This description should include a brief explanation of the need for and the goals of the new or amended regulation.

As recommended by the office of the Attorney General, the Board of Optometry intends to propose regulations to facilitate compliance with certain statutes governing practice. Specifically the Board will seek to clarify circumstances where an optometrist may locate his practice, maintain compliance with law governing ownership and avoid unlawful influences on his practice. By clarifying its criteria for deciding such cases, the Board hopes to increase compliance and therefore avoid costly case adjudication and litigation for itself and respondents. Guidance in complying with the law should increase access to qualified vision care services for the consuming public.

Basis

Please identify the state and/or federal source of legal authority to promulgate the contemplated regulation. The discussion of this authority should include a description of its scope and the extent to which the authority is mandatory or discretionary. The correlation between the proposed regulatory action and the legal authority identified above should be explained. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority must be provided.

18 VAC 105-20-10 et seq. Regulations Governing the Practice of Optometry were promulgated under the general authority of Chapter 24 of Title 54.1 of the Code of Virginia. Section 54.1-2400 (6) provides the Board the authority to promulgate regulations to administer the regulatory system:

§ 54.1-2400 -General powers and duties of health regulatory boards

The general powers and duties of health regulatory boards shall be:

...

6. *To promulgate regulations in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.) which are reasonable and necessary to administer effectively the regulatory system. Such regulations shall not conflict with the purposes and intent of this chapter or of Chapter 1 (§ [54.1-100](#) et seq.) and Chapter 25 (§ [54.1-2500](#) et seq.) of this title. ...*

Section 54.1-3205 restricts where and for whom an optometrist may practice:

§ 54.1-3205-Practicing in a commercial or mercantile establishment

A. *It shall be unlawful for any optometrist to practice his profession as a lessee of or in a commercial or mercantile establishment, or to advertise, either in person or through any commercial or mercantile establishment, that he is a licensed practitioner and is practicing or will practice optometry as a lessee of or in the commercial or mercantile establishment.*

B. *No licensed optometrist shall practice optometry as an employee, directly or indirectly, of a commercial or mercantile establishment, unless such commercial or mercantile establishment was employing a full-time licensed optometrist in its established place of business on June 21, 1938.*

C. *For the purposes of this section, the term "commercial or mercantile establishment" means a business enterprise engaged in the selling of commodities.*

D. *This section shall not be construed to prohibit the rendering of professional services to the officers and employees of any person, firm or corporation by an optometrist, whether or not the compensation for such service is paid by the officers and employees, or by the employer, or jointly by all or any of them.*

Section 54.1-3205.1 restricts the employment of an optometrist by a commercial or mercantile establishment:

§ 54.1-3205.1 -Supervision by unlicensed persons prohibited

No optometrist shall be directly or indirectly supervised within the scope of the practice of optometry by any officer, employee, or agent of a commercial or mercantile establishment, as defined in subsection C of § 54.1-3205, who is not a Virginia-licensed optometrist or physician. No officer, employee, or agent of a commercial or mercantile establishment, who is not a Virginia-licensed optometrist or physician, shall directly or indirectly control, dictate, or influence the professional judgment, including but not limited to the level or type of care or services rendered, of the practice of optometry by a licensed optometrist.

Section 54.1-3215 provides for disciplinary action against optometrists by the Board:**§ 54.1-3215 -Reprimand, revocation and suspension**

The Board may revoke or suspend a license or reprimand the licensee for any of the following causes...

- 10. Employing, procuring, or inducing a person not licensed to practice optometry to so practice;*
- 11. Aiding or abetting in the practice of optometry any person not duly licensed to practice in this Commonwealth;*
- 12. Advertising, practicing or attempting to practice optometry under a name other than one's own name as set forth on the license;*
- 13. Lending, leasing, renting or in any other manner placing his license at the disposal or in the service of any person not licensed to practice optometry in this Commonwealth;*
- 14. Splitting or dividing a fee with any person or persons other than with a licensed optometrist who is a legal partner or comember of a professional limited liability company formed to engage in the practice of optometry;*
- 15. Practicing optometry where any officer, employee, or agent of a commercial or mercantile establishment, as defined in subsection C of § [54.1-3205](#), who is not licensed in Virginia to practice optometry or medicine directly or indirectly controls, dictates, or influences the professional judgment, including but not limited to the level or type of care or services rendered, of the licensed optometrist;*
- 16. Violating other standards of conduct as adopted by the Board;*
- 17. Violating, assisting, inducing or cooperating with others in violating any provisions of law relating to the practice of optometry, including the provisions of this chapter, or of any regulation of the Board.*

Substance

Please detail any changes that would be implemented: this discussion should include a summary of the proposed regulatory action where a new regulation is being promulgated; where existing provisions of a regulation are being amended, the statement should explain how the existing regulation will be changed. The statement should set forth the specific reasons the agency has determined that the proposed regulatory action would be essential to protect the health, safety or welfare of citizens. In addition, a statement delineating any potential issues that may need to be addressed as the regulation is developed shall be supplied.

It is estimated that 160 optometry practices are located in conjunction with or adjacent to establishments that dispense optical goods. Typically such commercial establishments are engaged in the sale and dispensing of glasses and contact lenses by opticians¹. These offices represent a significant component of vision care being provided to the public.² While no formal

¹ The Board of Opticians regulates opticians. Like most regulated health care professions the practice of an optician may be owned by a general business corporation provided employees who are licensed render regulated services. Such ownership is not permitted for optometrists and dentists.

² Approximately 750 optometrist are residents of the Commonwealth organized in about 500 practices.

evidence of trends are available within the Department of Health Professions, it appears to Board staff that the number of such practices located near or “adjacent” to commercial establishments represents an expanding portion of vision care service.

Location of a practice adjacent to a commercial establishment has become a common occurrence in the Commonwealth. However, it is apparent that some optometrists have entered into leases and contracts when locating that run afoul of the application of statute cited above. In the past five years, nine percent of cases investigated for the Board of Optometry involved an allegation of a violation of the law cited above. However, these constitute 26 percent of the cases adjudicated on average each year where a finding of violation was determined. This represents a major demand on resources of the Board.³ In addition responding to charges brought by the Board is both costly and time consuming for the respondent practitioner.

Twenty orders involving violation of § 54.1-3205 for the last ten years were reviewed. Of the twenty orders, only one case also involved poor or substandard care. Licensees have been found in violation of the above cited provisions where they have not had access to their patient records, allowed access to confidential patient records, been inaccessible to patients and shared fees with optical establishments. However, there is no clear expression of these findings that a practitioner may rely upon when locating or establishing his practice.

The Board will consider adopting criteria that it will apply in determining if there is a need to proceed in such cases. Such rules will provide guidance and allow practitioners to organize in a way to maintain compliance with law and avoid costly and time-consuming disciplinary proceedings.

Alternatives

Please describe, to the extent known, the specific alternatives to the proposal that have been considered or will be considered to meet the essential purpose of the action.

The Board may choose to adopt criteria that assure confidentiality of patient records consistent with Title 32.1 of the Code, access to the optometrist by his patients, access by an optometrist to his practice location necessary to care for patients and provisions which bar incentives which may present a conflict with practice that, in the professional judgement of the optometrist, is not in the interest of the patient. The result of such rules would allow optometrist to locate adjacent to a commercial establishment or otherwise enter into agreements for services and goods that contribute to the safe and accessible vision care services by the optometrist.

Alternatively the Board may find that such a proposal cannot realistically address the issues and withdraw the proposal.

³ Typically such reports come from other licensees, the Virginia Optometry Association or unknown sources. No patient or consumer has ever been known to complain about a violation of the laws cited above.

In preparing and evaluating a proposal, the Board intends to seek comment and suggestions from practicing optometrists, individuals who practice adjacent to a commercial establishment, owners and staff of commercial or mercantile establishments, which provide optician services and patients. In developing its rule, the Board will only consider selection of the least burdensome alternative that assure patient access to competent and safe vision care services.

Family Impact Statement

Please provide a preliminary analysis of the potential impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The proposed regulatory action would not strengthen or erode the authority and rights of parents, encourage or discourage economic self-sufficiency, strengthen or erode the marital commitment or increase or decrease disposable family income.